Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PATRICK J. BERGIN, *Petitioner,*

v.

SUSAN MCCALL, *ET AL.*, *Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether coerced participation in a 12-Step based evaluation process violates the Establishment Clause, the Free Exercise Clause, and the First Amendment.

Whether a State Administrative Hearing has preclusive effect over Constitutional claims in Federal Court.

PARTIES TO THE PROCEEDING

The following individuals are parties in the court below: Susan McCall, Norman Reynolds, Kathleen Haley, Philip Parshley, David R. Grube, Clifford R. Deveney, David G. Watt, Lisa A. Cornelius, Ramiro Gaitan, Nathalie M. Johnson, Douglas B. Kirkpatrick, Gary J. LeClair, Patricia L. Smith, John C. Stiger, Sheridan A. Theringer, Judith L. Rice, Frank J. Spokas, Joseph L. Thaler, Suresht R. Bald, Marcia G. Darm, Lisa G. Dodson, and James D. Scott.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Patrick J. Bergin respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's judgment for defendants in his 42 U.S.C. § 1983 action raising various constitutional claims against member's of Oregon's Board of Medical Examiners and other parties.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the district court's grant of summary judgment to the defendants is not reported, and is attached hereto as Appendix A. The judgment of the United Stated District Court for the District of Oregon is not reported, and is attached hereto as Appendix B.

JURISDICTION

The judgment of the district court was entered on August 15, 2007. A timely notice to the United States Court of Appeal for the Ninth Circuit was filed on September 13, 2007.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"...
U.S. CONST. amend. I.

STATEMENT OF THE CASE

This petition seeks to remedy the widespread and systematic abuse of a preeminent constitutional right in this nation; the right to remain free from the imposition of particular religious views by the State. It is the contention of the petitioner that individuals acting in their individual capacities under color of Oregon State law, violated his right to remain free from the imposition of religion when they made a religiously based experience a condition of retaining his medical license.

Every State in this nation has an approach to behavioral questions concerning licensed health professionals. Often, this approach takes the form of coercing behavioral changes by imposing a diagnosis of "disease" (such as drug, alcohol, gambling or sex addiction) upon individuals who are suspected of inappropriate behaviors, or behaviors potentially harmful to self or others. The "disease" appellation then triggers an extensive monitoring and behavior modification program with an inherently religious cant. The diagnostic process is steeped in Temperance philosophy, and often prescribes a period of confinement at a "rehab facility", confinement for

which there is no medical basis, as studies have consistently shown no benefit of in-patient versus out-patient therapies for addictive behaviors.

There is analogy in the criminal justice system wherein an option of "diseasing" and "treatment" is offered as a substitute for incarceration, even in instance where there is only use of an illegal drug, without any legitimate medical diagnosis of drug abuse or dependence. Thus, the line between what is viewed as a crime, and what is viewed as a disease, is blurred for the sake of tempering punishment.

To the extent that States, and individuals acting under color of State law, regulate behaviors that adversely impact the quality of medical care rendered by practitioners, their imposition of penalties designed to improve practitioner safety and performance are well justified.

Unfortunately, States, and State actors, now engage in a form of social control that extends well beyond a mandate to regulate the medical professions, and into the private lives of individuals who happen to hold medical licenses of various types. For example, State Medical Boards may take it upon themselves to act against practitioners based not on reports of practice related impairment, but upon hearsay communicated anonymously regarding behavior unrelated to the practice of medicine, as in the present case. This reflects a moralistic perspective that is associated with the prohibition of mood altering drugs in the United States. Thus, a State's extension of its authority into the private life of a class of citizens in an effort to regulate morality is both irrational and an unconstitutional violation of certain principles regarding both religion and privacy, as in the present

case.

As a closely related phenomenon, the treatment industry in the United States has a particularly religious and moral perspective, as a direct consequence of the 12-Step movement of Alcoholics Anonymous, which informs and controls over 90% of addictive behavior diagnostic and treatment facilities in this country. This is in contrast to other nations, where a more pragmatic "harm reduction" philosophy has emerged, with great practical success.

Medical Boards have embraced the 12-Step paradigm, despite its fantastic and deeply religious approach to the "disease" of addiction, a "disease" that the 12-Steps teach can be cured by prayer.

To some extent, Medical Boards have given up any direct responsibility for evaluation and treatment, and simply choose to pass errant medical professionals off to the existing facilities, which are mostly 12-Step based.

When States, or individuals acting under color of State law, mandate 12-Step involvement, they mandate a religious experience as a condition of property (licensure), and in so doing they violate the First Amendment. as in the present case. It is to redress this violation that the present petition exists.

A. Factual Background

Petitioner Patrick J. Bergin, MD, practiced interventional and diagnostic cardiology without incident in Eugene, Oregon from 1988 to 2002. In October 2002 he was approached by Dr. Susan McCall of the Oregon Health Professionals Program (HPP) and told that he had been overheard to say that he

had used cocaine. The source of this allegation, a physician, remained anonymous. This anonymous individual alleged to Richard Romm, MD, plaintiff Bergin's medical practice partner at Oregon Cardiology, that he had overheard Bergin say that he had used a "controlled substance recreationally". Docket[1] no.1, p.4.

Romm discussed the communication with Dr. Susan McCall, Director of the Oregon Health Professionals Program. Docket no.1, p.3. McCall then arranged for a surprise meeting with Bergin in October of 2002, a meeting that has been characterized by the defense as an "intervention", however there were no complaints of behavioral issues or intoxication, and no concerns voiced by any of Bergin's colleagues, staff or patients. Docket no.1, p.4.

McCall coerced Bergin, under threat of suspension of his medical license, to sign a document agreeing to undergo an evaluation for a possible substance use disorder. Docket no.1, p.4. The document required that Bergin follow whatever recommendations emerged from the evaluation.

In November 2002, McCall conspired with defendant Dr. Norman Reynolds to perform an evaluation of Bergin. The outcome of this evaluation was pre-determined by McCall and Reynolds, and designed to place Bergin into a program of religious indoctrination. Docket no.1, p.4.

In November of 2002, Reynolds completed an evaluation alleged by Bergin to be substandard and diagnostically inaccurate. His evaluation report

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1 References to "Docket" refer to the Docket in Federal District Court case No. CV-06-06311-HO.

required that Bergin be treated by inpatient confinement at a "12 Step based facility". Docket no.1, p.5.

Bergin initially refused Reynolds' order to enter an in-patient facility. McCall responded by turning Bergin's file and her recommendations over to the Oregon Medical Board. The Board required that Bergin sign a stipulation withdrawing from practice pending investigation, under threat of license suspension. Docket no.12, p.5 .

In January 2003, Bergin capitulated to McCall and Reynolds' mandate for inpatient treatment and entered Sierra Tucson. Sierra Tucson espouses the 12 Step principles of prayer and abstinence. At Sierra Tucson, Bergin was told to comply with the religious regimen, and state that he had a disease, if he hoped to regain his license. Docket no.12, p.6.

In March of 2003 Bergin was required to meet with members of the Board and sign a stipulation stating that he had "habitual or excessive use of intoxicants". Bergin has alleged coercion of this stipulation acknowledging "habitual or excessive use of intoxicants". In addition, the Board members required that Bergin participate in McCall's program, the Oregon Health Professionals Program. This program required attendance at AA meetings, espousal of 12 Step principals, abstinence from alcohol, regular monitoring by a variety of mental health practitioners, and regular random urine tests for drugs and alcohol. Dr. McCall required regular and ongoing meetings with a 12 Step advocate, an alcoholic physician who acts to monitor attendance at AA meetings . Docket no.12, p.7.

This program of mandated abstinence and regular

religion was applied despite the fact that Bergin had no diagnosis of alcoholism or drug addiction..

Bergin enrolled in the HPP program in March of 2003, forced to endure ongoing religion and abstinence, as well as travel restrictions and mandated, time consuming, "support group" meetings for about a year, after which time McCall terminated Bergin from the HPP program and informed the Board that he had a urine test positive for ethyl glucuronide. This positive test caused Dr. McCall, and the Board, to believe that Bergin had consumed alcohol in violation of his stipulation with the Board. Docket no.12, p.7.

Defendant members of the Oregon Medical Board then issued an Order for Evaluation requiring that Bergin undergo an evaluation to determine "fitness for duty". The Board specifically required that Bergin be evaluated at one of four institutions approved by the Board Medical Director, Dr. Philip Parshley. Docket no.12, p.8. Parshley chose institutions that are unequivocally religiously based. This is true for both diagnosis and treatment. Bergin has asserted that it is a demonstrable fact that the institutions the Board chose for evaluation use religious beliefs to inform their diagnoses, as well as their treatments. Bergin refused to comply with an order that he believed to be pre-ordained to find him "diseased", based on religious belief. He offered instead to go to a respected center that does not espouse religious doctrine as an element of evaluations; the Board refused to allow this. Docket no.12, p.8. Nonetheless, Bergin proceeded to undertake evaluations by two nationally prominent experts, Dr. Alan Marlatt and Dr. Stanton Peele. Both of these experts determined that Bergin did not meet criteria for the diagnosis of substance or alcohol abuse or

dependence, and both concluded that the prior diagnosis by Reynolds had been substandard and inaccurate. Docket no.18, p.8.

In July of 2004, facing a Board disciplinary action for failure to comply with their order for evaluation, Bergin requested a contested case hearing. This was scheduled for November 2004. Although he had been terminated from the HPP in April of 2004 and no longer participated in Board or HPP ordered urine drug or alcohol monitoring, the Board chose to let him continue to practice medicine and did not issue an emergency suspension order. This status persisted until the Board issued a final order suspending him in March of 2005. For nearly a year, Bergin was let alone to practice medicine, and did so without incident. Docket no.64, p.9.

In November 2004, a contested case hearing was held in front of an Administrative Law Judge (ALJ). Docket no. 64, exhibit 1. During this hearing, Bergin presented evidence that he had never been impaired, that prior diagnosis of alcohol and substance abuse was wrong, and that he had not consumed beverage alcohol in violation of a Board Order. He also presented arguments indicating that religion was a critical element of evaluation and treatment at centers approved by the Board and Parshley. The ALJ chose to confine herself to the narrow issue of whether or not Bergin had violated a Board order for evaluation.

The Board of Medical Examiners defendants did not determine findings of fact or conclusions of law regarding any of the Constitutional issues raised by Bergin. Docket no.59, exhibit 1.

Following the administrative hearing, the Board ruled that Bergin had violated a Board order for

evaluation. Docket no.59, exhibit 1. In March of 2005, the Board proceeded to suspension of his license until such time as he would comply with their order for evaluation. Docket no.59, exhibit 1, p.23. Bergin did not comply, as he believed the order to unconstitutionally violate his right to be free of the imposition of religious belief.

In June of 2006 the Board issued Bergin a Notice of Proposed Disciplinary Action. Bergin was afforded the option of a contested case hearing which, in a private communication, Assistant Attorney General Warren Foote told him would be confined to the narrow issue of whether he has continued to defy a Board Order.

In a letter to Assistant Attorney General Warren Foote dated January 22, 2007 (Docket no. 59, exhibit 5.), Bergin addressed the lack of adequate due process presented by Board administrative hearings, and specifically articulated the failure of the hearing officer to be empowered to make a final decision in the case, as well as the refusal of the Board to hear the constitutional issues raised by Bergin. It was clear that Bergin would not be afforded a due process venue for any of the key constitutional issues that he had raised. Accordingly, Bergin declined the administrative hearing option, and proceeded to seek redress in Federal Court.

B. Proceedings in the District Court

On December 7, 2007, Petitioner filed this action in the United States District Court for the District of Oregon, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and the First, Fourth and Fourteenth Amendments to enjoin the violation of his

constitutional rights arising out of the selective, arbitrary and capricious exploitation of an anonymous report of an eavesdropped conversation, and the imposition of a religious experience as a condition of medical licensure. Petitioner also filed a motion for a preliminary injunction, and, pending that, a temporary restraining order enjoining the members of the Oregon Medical Board from violating petitioner's constitutional rights. Absent a hearing, the district court dismissed the case and denied Petitioner's motions as moot on August 15, 2007. Plaintiff filed a timely notice of appeal on September 13, 2007.

C. Proceedings on Appeal

On December 31, 2007, Petitioner filed his opening brief on appeal. Thereafter, absent oral argument, the court of appeals affirmed the district court's dismissal on December 17, 2008.

REASONS FOR GRANTING THE WRIT

I. Review is warranted Because The Ninth Circuit Court Of Appeals Impermissibly Granted Preclusive Affect To An Administrative Hearing On A Constitutional Question In A Manner Clearly Contradictory To This Court's Teachings In *Califano V. Sanders*, 430 U.S. 99 (1977).

The right to seek redress of civil rights violations is paramount in our nation. In the case at hand, members of the Oregon Board of Medical Examiners,

ruling on their own behalf, denied Bergin's contention that his First Amendment right to be free from the imposition of religion would be violated by compliance with their order for evaluation. In Oregon, the presiding Administrative Law Judge does not have "final decision making power", and did not rule on the issue of First Amendment violation. Thus, the individual members of the Oregon Medical Board were left to determine a Constitutional question concerning their own deprivation of Bergin's Constitutional rights.

It is clear from this Court's teaching in *Califano v. Sanders* that, "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."

Notwithstanding the inadequacy of an administrative hearing wherein the Administrative Law Judge presiding does not have a "final say" over the determinations, the intent is clear; a contention of violation of a United States Constitutional right cannot be finally adjudicated at the level of an administrative hearing.

II. Review Is Warranted Because The Lower Court's Summary Dismissal Of The Plaintiff's Contention Of First Amendment Violation By Members Of The Oregon Medical Board Conflicts With The Decisions Of This And Other Courts.

This case also warrants the Court's review because it presents important questions relating to the most fundamental of all constitutional rights; the rights to

remain free from imposition of, and to the free exercise of, religion. Specifically, this case challenges the imposition of a 12-Step based evaluation approach, as a condition of medical licensure, as violative of the Establishment Clause, the Free Expression clause, and the First Amendment.

A. The 12-Step Based Evaluation Process Constitutes a Violation of the First Amendment.

It is well established that the First Amendment prohibits government officials from imposing a system of religious belief upon its citizens, or interfering with their right to express, or deny, religious beliefs. This core holding has consistently been emphasized by this Court. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *see also Lee*, 505 U.S. at 604 (Blackmun, J., concurring)("[P]roof of government coercion is not necessary to prove an Establishment Clause violation [but], it is sufficient."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (emphasizing importance of the presence of "private choice" to avoid violations of the Establishment Clause).

In addition, the 12-Step belief system of Alcoholic Anonymous (AA) has been established as a religious belief system by the lower courts. It has been described by the Second Circuit in *Warner* as comprising "intensely religious events," 115 F.3d at 1075, and by the Seventh Circuit in *Kerr v. Farrey* as

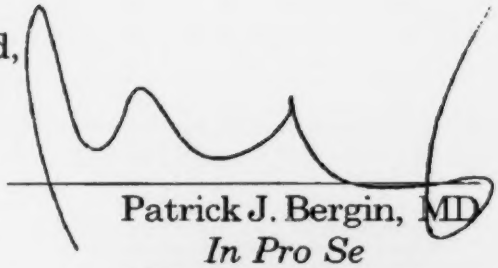
"fundamentally based on a religious concept of a Higher Power." *Kerr v. Farrey*, 95 F.3d at 480 (7th Cir.1996). Further, the more recent decision in *Inouye v. Kemna* affirms that AA 12-Step programs may not be coerced by the State: "While we in no way denigrate the fine work of AA/NA, attendance in their programs may not be coerced by the state. The Hobson's choice Nanamori offered Inouye — to be imprisoned or to renounce his own religious beliefs — offends the core of Establishment Clause jurisprudence." *Inouye v. Kemna* 504 F.3d 705, 714 n.9 (9th Cir. 2007).

It is the contention of the Petitioner that coerced attendance at a 12-Step based evaluation and treatment facility, even if for the purpose of evaluation only, violates the First Amendment by requiring participation in a form of religious experience that is informed by religious thinking and religious events.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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April 9, 2009

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK J. BERGIN,

Plaintiff-Appellant,

v.

SUSAN MCCALL; et al.,

Defendant-Appellees,

No. 07-35801

D.C. No. CV-06311-MRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Submitted December 17, 2008**

Before: GOODWIN, WALLACE, and RYMER, Circuit Judges.

Patrick J. Bergin appeals pro se from the district court's judgment for defendants in his 42 U.S.C. § 1983 action raising various constitutional claims

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

against members of Oregon's Board of Medical Examiners ("Board") and other medical professionals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994), and we affirm.

The district court properly granted summary judgment because Bergin's claims were precluded by the Board's order suspending Bergin's medical license. *See id.* at 1037 n.7 ("[W]e will give preclusive effect to the legal as well as the factual decisions of [state] administrative tribunals, if the courts of the state would do so and if the minimum requirements of [*United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)] are met."); *id.* at 1033 ("The fairness requirements of *Utah Construction* are: (1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate."); *Chavez v. Boise Cascade Corp.*, 772 P.2d 409, 410 (Or. 1989) ("[A] valid and final administrative adjudication has the same preclusive effects as a court's judgment.").

The district court properly dismissed Bergin's claims against his former medical partner because Bergin did not file those claims within two years after they accrued, as required by Oregon's personal injury statute. See Or. Rev. Stat. § 12.110(1); *Davis v. Harvey*, 789 F.2d 1332, 1333 (9th Cir. 1986) ("Section 1983 claims are to be characterized as personal injury actions for statute of limitations purposes.").

Bergin's remaining contentions are unavailing.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PATRICK J. BERGIN,	)	
	)	
Plaintiff,	)	Civil No. 06-6311-HO
v.	)	
	)	ORDER
SUSAN MCCALL, et al.,	)	
	)	
Defendants.	)	
	)	

Plaintiff brings this action alleging violation of his civil rights in violation of 42 U.S.C. § 1983. Plaintiff alleges that defendants conspired to: coerce plaintiff to be evaluated for substance abuse; force plaintiff to participate in a drug rehabilitation facility that uses religious indoctrination; force plaintiff to profess belief in religious dogma; and to revoke his license to practice medicine. Plaintiff asserts that defendant Norman Reynolds, in a conspiracy with the other defendants, falsely diagnosed plaintiff with substance abuse and that defendants conspired to confine plaintiff in a religiously based facility and to contrive allegations resulting in plaintiff's loss of his medical license.

There are several motions before the court.

A. Plaintiff's Motion to Allow Filing of a Second Amended Complaint (#32)

Although plaintiff moved to amend after a motion to dismiss had been filed, the motion is allowed and the court will construe the pending motion to dismiss as against the Second Amended Complaint.

B. Defendant Norman Reynolds' Motion to Dismiss (#21)

Defendant Dr. Norman Reynolds moves to dismiss, asserting that plaintiff fails to raise any allegations against him within the two year statute of limitations and that he is entitled to absolute immunity.

Plaintiff alleges that in September and October of 2002, defendant Richard Romm, plaintiff's former cardiology practice partner, discussed with Oregon Health Professional's Director, defendant Susan McCall, concerns that plaintiff used controlled substances recreationally. Plaintiff alleges that in November of 2002, defendant McCall conspired with defendant Reynolds to have Reynolds perform an evaluation of plaintiff. Plaintiff asserts that McCall and Reynolds predetermined the outcome of the evaluation, performed on November 11 and 12 of 2002, and designed it to place plaintiff into a program of religious indoctrination.

Plaintiff alleges that defendant Reynolds completed his evaluation on November 27, 2002, and recommended plaintiff for rehabilitation in a religious facility. The complaint relates that plaintiff's refusal to comply with religious indoctrination resulted in suspension of his license in January of 2003. Plaintiff's license was restored on the condition that he abstain from consumption of

alcohol and submit to random testing. However, plaintiff alleges that upon testing positive for alcohol, he was again forced to participate in religious counseling or lose his license. On March 7, 2005, plaintiff's license was again suspended. Plaintiff's Second Amended Complaint adds that Reynolds communicated with other defendants "in a continued, malicious and conspiratorial effort to affirm a mandate that plaintiff Bergin be evaluated and/or treated by religiously based facilities" during the period from June 2004 to March 2005.

Oregon's two-year statute of limitations for personal injury actions applies to actions under 42 U.S.C. § 1983. Cooper v. City of Ashland, 871 F.2d 104, 105 (9th Cir. 1989). Plaintiff filed the initial complaint in this case on December7, 2006. In an effort to avoid the limitations period, plaintiff asserts that defendant Reynolds' acts and omissions occurred from November 2002 until March 2005. Plaintiff also asserts that his cause of action did not accrue until his second license suspension in March 2005.

However, it is clear from plaintiff's complaint that he knew he sustained his alleged injury of violation of his religious and other rights guaranteed by the First and Fourteenth Amendments earlier. Plaintiff alleges that he stated a willingness to enter a rehabilitation facility, if it was not religious based, on June 30, 2004. Proposed Second Amended Complaint (attached to #32 at ¶ 28). Plaintiff alleges concrete injury in the complaint beginning as early as 2003.

Plaintiff concedes that the First Amended

Complaint does not specifically describe post 2002 activity by defendant Reynolds and plaintiff only adds conclusory conspiracy allegations regarding affirming that 2002 activity in the Second Amended Complaint.

The accrual of civil conspiracies for limitations purposes is determined in accordance with the last overt act doctrine. Venegas v. Wagner, 704 F.2d 1144, 1146 (9th Cir. 1983). Under the doctrine, "[i]njury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy." Kadar Corp. v. Milbury, 549 F.2d 230, 234 (1st Cir. 1977) (quoting Hoffman v. Halden, 268 F.2d 280, 303 (9th Cir. 1959). Thus, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff, Lawrence v. Acree, 665 F.2d 1319, 1324 (D.C.Cir 1981), and "[s]eparate conspiracies may not be characterized as a single grand conspiracy for procedural advantage." Fitzgerald v. Seamans, 553 F.2d 220, 230 (D.C.Cir. 1977).

The last alleged overt act by Reynolds occurred in 2002. The alleged later :effort to affirm" that act does not bring the act within the limitations period. See Columbia Steel Casting Co., Inc. v. Portland General Elec. Co., 111 F.3d 1427, 1444-45 (9th Cir. 1996). (mere reaffirmation is not an overt act sufficient to restart the statute of limitations). To establish a continuing violation, continued unlawful acts must be demonstrated. Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981). It is the wrongful act, not the conspiracy, which is actionable in a civil case. The existence of a conspiracy does not

generally postpone accrual of causes of action arising from the conspirators' separate wrongs. See Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984). Plaintiff's Second Amended Complaint makes clear that defendant Reynolds did not take any further affirmative steps such that plaintiff can avoid that statute of limitations. In addition, the court agrees, for the reasons stated in defendant Reynolds' briefing, that the complaint against Reynolds should be dismissed in witness, quasi judicial and medical consultant immunity grounds. Accordingly, defendant Reynolds' motion to dismiss is granted with prejudice.

C. Stipulated Motion to Dismiss (#29)

The parties stipulate to the dismissal of the defendant Richard Romm. The motion to dismiss defendant Romm is granted with prejudice.

D. State Defendants' Motion for Summary Judgment (#58) and Defendant Norman Reynolds' Motion for Joinder (#62)

The state defendants seek summary judgment. Defendant Reynolds moves to join the summary judgment motion. As noted above, the private individual defendants, defendants Romm and Reynolds, have been dismissed from this case. Accordingly, defendant Reynolds' motion to join is denied as moot.

The State defendants assert that (1) many of plaintiff's section 1983 claims fall outside the applicable statute of limitation: (2) plaintiff's claims are barred by issue and claim preclusion; (3)

plaintiff's due process claims are precluded by plaintiff's failure to appeal the Oregon Board of Medical Examiner's final order to the Oregon Court of Appeals; (4) they are entitled to absolute judicial immunity; (5) the court lacks jurisdiction pursuant to the Younger abstention doctrine; (6) plaintiff's claims are barred under the Rooker-Feldman doctrine; (7) the court lacks jurisdiction under the Eleventh Amendment; and (8) plaintiff was not denied equal protection preventing a 42 U.S.C § 1985 (3) conspiracy claim.

Plaintiff does not appear to be pursuing a section 1985 claim nor could he because he has not alleged racial or otherwise class-based "invidious discriminatory animus" for the conspiracy. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268-69 (1993).

While plaintiff has named Board members individually, the complaint makes clear he is suing them in their official capacity. See, e.g., Second Amended Complaint at ¶ 16 (McCall acting in her official capacity as Director of the Oregon Health Professionals Program); ¶ 21 (individual members of the Oregon Board of Medical Examiners acting in their official capacity). Consequently, to the extent plaintiff seeks relief that is not in the form of prospective injunctive relief, his claims are barred under the Eleventh Amendment.

The state agencies and members of those agencies are immune under the Eleventh Amendment. See Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600, 603 (9th Cir. 1986) (a suit against a state agency is considered to be a suit

against the state, and thus is barred by the Eleventh Amendment). "When suit is commenced against State officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever State policies or procedures are at stake." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U S. 261, 269 (1997).

Plaintiff may avoid the Eleventh Amendment under the Ex Parte Young doctrine. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 102 (1984). However, under this exception, a plaintiff may only seek prospective injunctive relief that governs the official's future conduct. The court may not reward retroactive relief that requires the payment of funds from the State treasury. Id. At 102-03. The Supreme Court has cautioned against permitting federal court action in every case where prospective injunctive relief is sought against officers named in their individual capacities. The Supreme Court instructs that application of the Ex parte Young doctrine must reflect a proper understanding of its role in the federal system and respect for State courts instead of a reflexive reliance on an obvious fiction. Coeur d'Alene Tribe of Idaho, 521 U.S. at 270. Accordingly, the Eleventh Amendment serves to bar at least plaintiff's claims seeking a declaration regarding past actions and seeking monetary damages for that past action.

In addition, the Oregon Board of Medical Examiners has immunity from suit and the individuals also enjoy immunity because they are not empowered to act alone. See ORS § 677.335(1). However, this does not make an Ex parte Young

action inappropriate. The Court has permitted actions against individual officials to go forward even though an action could not be brought against the state agency by whom the officials are employed. See, e.g., Alabama v. Pugh, 438 U.S. 781 (1978). Nonetheless, plaintiff may only go forward with prospective relief against the Commissioners to enjoin them from taking action that allegedly continues to violate federal law.

However, plaintiff also runs into the obstacle of issue and claim preclusion. After a hearing on November 3, 4, and 5 of 2004, before the Board of Medical Examiners, the following factual findings were made:

1. Patrick John Bergin, MD, is a licensed physician in the state of Oregon. He is a cardiologist, and a member of the Oregon Cardiology P.C. practice group in Eugene, Oregon.

2. In the spring of 2002, Dr. Bergin separated from his wife after 26 years of marriage. In the summer of 2002, Dr. Bergin began dating and socializing with a new group of friends. He had dinner and attended parties with these friends. He hosted "tailgate" parties in connection with University of Oregon football games. (Tr. 1 at 267.69). He would also occasionally go to Adam's Place, a drinking establishment, to meet friends and drink martinis (Tr. 1 at 254.)

3. Dr. Bergin used cocaine in August 2002. He attended parties where cocaine was available and

offered and, on a couple of occasions, decided to partake of it. (Tr. 1 at 254-55.)

4. At some point prior to October 19, 2002, one of Dr. Bergin's medical partners, Dr. Romm, received a report that Dr. Bergin was keeping late night hours and using cocaine. Dr. Bergin's partners took this report seriously and contacted Dr. Susan McCall, the Medical Director of the Oregon Diversion Program for health professionals. The partnership hoped that they could avoid Board involvement by contacting the diversion program. Based on this conversation with Dr. McCall, the partners invited her to participate in an intervention meeting they planned to have with Dr. Bergin on October 21, 2002. (Tr. 2 at 31-32; 50-52)

5. On Saturday, October 19, 2002, Dr. Bergin rented a recreational vehicle (RV) and hosted a cookout and tailgate party before the University of Oregon football game. The game began at 12:30 p.m. Dr. Bergin consumed a few beers at the party before the game, and may have had another beer when he returned to his home with his friend and co-worker, Dr. Joe Chambers. The two had dinner, and Dr. Chambers left Dr. Bergin's around 9 p.m. About an hour later, Dr. Bergin went to the bar at Adam's Place. While there, he ate some chicken and drank martinis. (Tr. 1 at 246-52.)

6. Dr. Bergin left Adam's Place shortly before midnight. On his way home, he was stopped by a Eugene police officer for speeding and failing to

maintain a lane. Upon contact with Dr. Bergin, the officer detected the odor of alcoholic beverage and observed other indicia of intoxication. Just after midnight on October 20, 2002, the officer arrested Dr. Bergin for driving under the influence of intoxicants (DUII) in violation of ORS 813.010. Dr. Bergin told the officer that he had had "a couple" martinis at Adam's Place. Following the arrest, Dr. Bergin submitted to a breath test on an Intoxilyzer 5000, which disclosed a .13 blood alcohol content. (Ex All.)

7. The next day, Monday, October 21, 2002, Dr. McCall and three of Dr. Bergin's partners, Drs. Romm, Chappell, and Hahn, confronted Dr. Bergin about his alleged cocaine use. [footnote omitted] They also expressed concern about this drinking and keeping late hours. Dr. Bergin's partners were aware that he was under a lot of stress as a result of his impending divorce. They perceived him to be in a "crisis" at that point. They also believed he was "burning the candle at both ends," trying to manage his medical practice while dealing with his separation, impending divorce and child care issues. (Tr. 2 at 33-49).

8. During the October 21, 2002, meeting, Dr. Bergin denied using cocaine. He acknowledged, however, that he was under a lot of stress and that he drank too much at times. As a result of this intervention, Dr. Bergin signed an agreement with the Oregon Health Professionals Program (HPP) and agreed to undergo an in-patient evaluation at the Betty Ford

Center in California (Tr 1 at 257-58; Tr. 2 at 50-52; Exs A7 and A10 at 28).

9. At Dr. McCall's behest, Dr. Bergin participated in a telephone intake interview with the Betty Ford Center prior to entering the center. During the intake interview, Dr. Bergin admitted to recent cocaine use. Dr. McCall overheard this admission. Dr. Bergin later refused to attend an in-patient evaluation at the Betty Ford Center, [footnote omitted] and Dr. McCall threatened to report him to the board. She advised that the Board would require him to attend an in-patient evaluation. (Ex. A10 at 29).

10. Dr. Bergin subsequently agreed to undergo an out-patient evaluation with someone who was not affiliated with the Betty Ford Center (Tr 1 at 261). On November 11 and 12, 2002, Dr. Bergin underwent a "comprehensive fitness-for-duty" by Norman T. Reynolds, MD, a psychiatrist based in San Jose, California. Dr. Reynolds interviewed Dr. Bergin for more that 10 hours. He also administered psychological tests, reviewed Dr. Bergin's medical and police reports, and conducted collateral interviews regarding Dr. Bergin with Dr. McCall, Dr. Chappell and Dr. Michael D. Webb, a psychiatrist who Dr. Bergin saw in 1999. (Ex A10; tr. 1 at 168-170).

11. Dr. Reynolds determined that Dr. Bergin was not a reliable historian. He believed that Dr. Bergin provided distorted information by means of

significant omissions, concealment and denial. Dr. Reynolds determined that, despite Dr. Bergin's belief that he could control his alcohol use, Dr. Bergin had a problem with alcohol abuse and possible dependence. And, although Dr. Bergin denied ever using cocaine, Dr. Reynolds believed (based on information from Dr. McCall) that Dr. Bergin had recent problems with cocaine and marijuana use. Dr. Reynolds found "many red flags that indicate impairment." He reported that Dr. Bergin was exhibiting problems in several areas of his life: medical stress-related symptoms, deterioration of marriage, quickly finding a new committed relationship, social life activities, and legal problems with the DUII. Dr. Reynolds diagnosed Dr. Bergin with an alcohol abuse disorder, possible substance abuse disorder, and adjustment disorder and psychological factors affecting physical condition. (Ex. A10; tr. 1 at 172-174).

12. In a detailed report issued November 27, 2002, Dr. Reynolds concluded that Dr. Bergin was not fit for duty. He strongly recommended that Dr. Bergin be admitted to a residential treatment program to address substance abuse and psychiatric and behavioral problems. Dr. Reynolds also recommended that the treatment and recovery program "include 12-Step programs." (Ex. A10).

13. After Dr. Reynolds' evaluation and report, Dr. Bergin agreed to attend an in-patient evaluation and treatment program at Sierra Tucson in Arizona. Dr. Bergin chose Sierra Tucson over other programs

because it required a 30-day stay, whereas other programs required longer stays. Dr. Bergin realized that his continued practice of medicine was dependent upon his participation in a treatment and recovery program, and he agreed to go after the Christmas holiday. (Tr. 2 at 64-66).

14. By letter dated January 8, 2003, the Board advised Dr. Bergin that it had opened and investigation on his practice status, his recent DUII arrest and his fitness-to practice evaluation. Dr. Bergin signed an Interim Stipulated Order, in which he agreed to temporarily withdraw from the practice of medicine pending the outcome of the Board's investigation (Ex. R2).

15. On January 13, 2003, Dr. Bergin was admitted to Sierra Tucson. During the initial psychiatric interview with Joe W. King, MD, Dr. Bergin reported that he had been "partying [his] ass off' since his marital separation in May 2002. Dr. King, who diagnosed Dr. Bergin with polysubstance abuse, currently related to alcohol and cocaine, found Dr. Bergin to be quite defensive during the interview. He reported: [A]lthough [Dr. Bergin] is giving lip service to having accepted the significance of his alcohol and cocaine abuse, he still uses rationalization, justification, minimization and some projection in describing the events of the past several months." Dr. King also noted that although Dr. Bergin described himself as an agnostic who was raised as a Catholic, he did not identify any spiritual block to accepting a 12-Step program. (Ex. A9).

16. Dr. Bergin was discharged from Sierra Tucson on February 15, 2003. Evaluators at the treatment program deemed him fit to return to the practice of medicine. (Ex. A9) Following his discharge, Dr. Bergin agreed to participate in a diversion program under the auspices of HPP. (Ex. R8).

17. On March 6, 2003. Dr. Bergin entered into a Stipulated Order with the Board. In that stipulation, Dr. Bergin conceded that he had violated ORS 677.190(7), which prohibits the habitual or excessive use of intoxicants, drugs or controlled substances. The Board terminated its interim order and reinstated Dr. Bergin's license under certain terms of probation. Among others things, Dr. Bergin stipulated that he would participate in, and maintain compliance with, the recommendations of a HPP recovery program. Hel also stipulated that he "shall not possess and shall completely abstain from using ethanol and any mood altering or potentially addictive substances, including controlled substances" (ex. A4).

18. For the next year, as part of his participation in the HPP program, Dr. Bergin was subjected to random urine testing. These tests were negative for ethanol and controlled substances (Ex. A25).

19. On March 11, 2004, Dr. Bergin was asked to provide a urine sample. He had last been tested about a month before, on February 6, 2004. The March 11, 2004 sample was negative for ethyl

alcohol and controlled substances, but showed an unacceptably low creatinine level. The "acceptable range" for creatinine is between 20 and 400 mg/dL, and Dr. Bergin's urine test disclosed a level of 12.5 mg/dL. [footnote omitted] A creatinine level of less than 20 mg/dL is evidence of dilution in the urine. The 12.5 creatinine level indicated that Dr Bergin had consumed a substantial amount of fluid, probably a gallon or more, in the hours before he provided the sample at 4:55 p.m. on March 11th. (Ex. A25; tr. 3 at 58-60, 75, 151-52).

20. Dr. Bergin was next called to provide a urine sample on March 24, 2004. Because of the unacceptable creatinine level in his previous sample, HPP sent Dr. Bergin's sample taken on March 24, 2004, to National Medical Services, Inc., a laboratory in Pennsylvania. National Medical Services tested the sample specifically for the alcohol metabolite, ethyl glucuronide (EtG). [footnote omitted] (Ex. A20.) Dr. Bergin was unaware that HPP intended to have his urine tested for the presence of EtG. (Tr. 3 at 164).

21. National Medical Services tested two aliquots of Dr. Bergin's urine sample. both were positive for EtG. The first urine screen showed 2639 nanograms per milliliter (mg/mL) EtG, which prompted the second test. The second EtG confirmation test showed 3131 ng/mL [footnote omitted] (Ex. A20, tr. 1 at 37-41).

22. Following the positive EtG testing at National

Medical Services, Dr. Bergin's March 24, 2004, urine sample was sent to Northwest Toxicology Laboratory in Utah. Northwest Toxicology also ran a screen and confirmation test on the sample, both of which came back positive for EtG. The first test showed 4141 ng/mL, and the second showed 2886 ng/mL. [footnote omitted] (Ex. A21; tr at 97-98).

23. When Dr. Bergin was advised of the positive EtG test results, he denied consuming any alcoholic beverages and was adamant that the laboratory testing showed a false positive. (Ex. A6.) Because Dr. Bergin refused to accept the verified toxicology results and refused to acknowledge having a substance use disorder, Dr. McCall terminated him from HPP for non-compliance. Dr. McCall then referred the matter to the Board for further investigation. (Ex. A5.) By letter dated April 19, 2004, the Board notified Dr. Bergin that it had received a complaint regarding his compliance with the Stipulated Order. (Ex. R9.)

24. As a part of its investigation, the Board requested that Dr. Bergin undergo another independent, multi-disciplinary evaluation and continue with random substance abuse monitoring. Dr. Bergin refused to sign the Board's proffered Interim Stipulated Order (ex. A12).

25. On June 3, 2004, the Board issued an Order for Evaluation, in which it ordered Dr. Bergin to undergo an in-patient multi-disciplinary evaluation to assess his physical and mental capacity to safely

and competently practice medicine in Oregon. The Order also required that the evaluation be done at a health care facility pre-approved by the Board's Medical Director and that Dr. Bergin enroll in and begin the evaluation within 30 days from the date of the Order (Exs. A2, R11).

26. Dr. Bergin did not begin any in-patient assessment program at a Board approved facility within 30 days of the Order for Evaluation. He did, however, undergo a diagnostic assessment by Alan Marlatt, PhD, the Director of the Addictive Behaviors Research center at the University of Washington in Seattle Ex. R13). Dr. Bergin also commissioned Stanton Peele, PhD, an addiction, psychology and legal expert in New Jersey, to review his case record and determine whether he had an alcohol or substance abuse problem in the fall of 2002. (Ex. R15.) Neither of these evaluators were approved by the Board or it's Medical Director.

27. Dr. Marlatt interviewed Dr. Bergin for two hours on June 22, 2004, reviewed his prior assessment records, and had him complete a Comprehensive Drinker Profile. Dr. Marlatt considered Dr. Bergin to be cooperative and a reliable historian. Dr. Marlatt concluded that, notwithstanding Dr. Bergin's 2002 DUII arrest and occasional cocaine use, Dr. Bergin did not meet the diagnostic criteria of abuse or dependence (Ex. R13; tr. 1 at 128-45.)

28. Dr. Peele reviewed Dr. Bergin's assessment and

evaluation records and determined that Dr. Bergin did not meet the DSM-IV-TR criteria for alcohol or drug abuse or dependence. Dr. Peele questioned Dr. Reynolds' diagnosis and conclusions and the evaluations of Dr. Bergin from Sierra Tucson. Dr. Peele also identified potential legal issues if the Board required that Dr. Bergin undergo an evaluation at a treatment facility that employs a "12-Step" approach. [footnote omitted] (Ex. R15).

29. By letter to the Board dated June 30, 2004, Dr. Bergin's attorney responded to the Order for Evaluation. The letter opened, "My client Dr. Patrick Bergin, wishes to respond to the Order for Evaluation signed by Dr. Spokas and issued June 3, 2004, in a cooperative and complete manner." The letter asserted that Dr. Bergin had complied with the Order for Evaluation in substance by virtue of the Dr. Marlatt evaluation. The letter also stated an objection to participating in any in-patient evaluation conducted at any institution that employed a "12-Step" treatment model. In addition, Dr. Bergin's attorney maintained that Dr. Bergin never exhibited evidence of impairment or dysfunction and therefore the prior mandated evaluations and recommendations were inappropriate and erroneous. (Ex. R12.)

30. The Board determined that Dr. Bergin did not comply with the Order for Evaluation in a timely fashion. Thereafter, on July 30, 2004, it issued a Complaint and Notice of Proposed Disciplinary Action to Dr. Bergin. The Complaint alleged that

Dr. Bergin consumed alcohol in violation of the March 6, 2003, Stipulated Order. The Complaint further alleged that Dr. Bergin did not comply with the Order for Evaluation because the health care professionals he consulted were not presented to the Board for approval and did not meet the standard of a multi-disciplinary evaluation center. (Ex. A1).

31. EtG is a urinary marker for alcohol use. Testing for the presence of EtG in urine has been widely used in Europe since 1999 as evidence of alcohol consumption. (Tr. 1 at 46-48.) The marker, and the testing for it, are now gaining use and acceptance in the United States. (A19 at 1.) National Medical Services has been performing EtG testing for two years. (tr. 1 at 62.) Northwest Toxicology began its EtG testing program in March 2004. (TI. 1 at 105.) Now that an assay for EtG is commercially available in this country, an increasing number of abstinence programs rely on the testing as a way to determine whether participants are abstaining from alcohol use. (TI. 1 at 108-09).

32. Only .02-.04 percent of ethyl alcohol ingested is metabolized to EtG. The metabolite is not detectable unless alcohol has been consumed because such a small fraction of consumed alcohol is metabolized to EtG, a significant amount of alcohol must be consumed for EtG, a significant amount of alcohol must be consumed for EtG to be detected in urine (Ex. A19 at 1-3).

33. Although it is generally accepted in the scientific

community that ethyl alcohol is the only source for the production of EtG, the studies have yet to establish any clear correlation between EtG levels in the urine and the amount of alcohol consumed and/or the time of consumption. (Tr. 1 at 75, 107-08; tr. 3 at 8-12). Consequently, while the presence of EtG in the urine demonstrates that the test subject consumed ethyl alcohol, the testing does not show when the alcohol was consumed, how much was consumed or whether the person was intoxicated as a result of the consumption [footnote 9 omitted] (Tr. 3 at 13-14).

34. Dr. Michael Feldman, PhD, who has a doctorate in drug metabolism and a post-doctorate degrees in analytical toxicology, is the General Manager of Northwest Toxicology Laboratory. (TI. 1 at 79-80). Northwest Toxicology has conducted in-house studies to determine what kind of EtG levels could be detected after incidental contact with ethanol. The laboratory's studies included the test subjects' use of Nyquil, Listerine, O'Doul's non-alcoholic beer, cooking wine, Purel hand cleaner (which is 62 percent ethanol), and communion wine. The results consistently showed EtG levels of less then 250 ng/mL from any of these exposures. The laboratory's policy, developed through its testing and consultation with experts, is that if the EtG level is above 500 nanograms, incidental alcohol exposure is extremely unlikely. (Tr. 1 at 92-97, 100.) In Dr. Feldman's opinion, a urine EtG level in excess of 2500 nanograms is indicative of beverage alcohol consumption. (Tr. 1 at 95-97).

35. Dr. Edward Barbieri has a PhD in pharmacology and is a forensic toxicologist at National Medical Services laboratory. (Tr. 1 at 21-22). Like Northwest Toxicology, National Medical Services has conducted small-scale studies regarding incidental contact with ethanol. All the tests showed EtG levels below 250 nanograms, except for one, A very petite pregnant woman, who repeatedly rinsed with mouthwash over the course of a day, had a level of 310 nanograms per milliliter from this exposure (Tr. 1 at 61-64). In Dr. Barbieri's opinion, an EtG level of 2600 to 3100 nanograms indicates that the person consumed an alcoholic beverage. (Tr. 1 at 50-51).

36. Dr. Robert Pandina, PhD, is the director for the Center of Alcohol Studies at Rutgers University. By training, he is a developmental neuropsychologist and psychopharmacologist. (Tr. 3 at 4.) In his opinion, the "most likely source" for a positive EtG reading of 2500 to 4400 ng/mL is the voluntary consumption of beverage alcohol. Dr. Pandina noted, however, that this level is "not so extreme" so as to completely rule out the possibility of exposure to other substances. (TI. 3 at 19.)

Final Order of Board of Medical Examiners at pp. 2-9 dated February 3, 2005 (attached to Memo in support of the Summary Judgment (#59)).

The Board concluded that plaintiff willfully violated ORS §677.190(18), engaged in unprofessional or dishonorable conduct in violation of ORS §§ 677.190(1); ORS 677.188(4) (a), but did not

engage in habitual or excessive use of intoxicants during March 2004. The Order stated sanctions are warranted for willfully violating a Board order. Dr. Bergin raised many of the arguments he raises in his current complaint before the Board, including his objection to religious programs.[11] The Board granted plaintiff a contested case hearing where he was represented by counsel and had the ability to present evidence and witnesses and to cross-examine adverse witnesses. The Board also provided the opportunity to appeal pursuant to ORS § 183.482. Plaintiff chose not to appeal.

A federal court must give the same preclusive effect to a state court judgment as would be given that judgment under the law of the state in which the judgment was rendered. Migra v. Warren City School Dist. Bd. of Educ. 104 s. Ct. 892, 896, 465 U.S. 75, 81 (1984). The well established rule in Oregon is that a plaintiff who has prosecuted one action against a defendant through to a final judgment binding on the parties is barred on *res judicata* grounds from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action.
Rennie v Freeway Transport, 294 Or 319, 656 p.2d 919, 921 (1982).

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[1] The Board did not require participation in a 12-step program. Final Order at p. 18

Oregon Courts have established that preclusive effect may be given to the essential findings of administrative agencies, if the parties had a full and fair opportunity and incentive to be heard and the decision was subject to judicial review. Stanich v. Precision Body and Paint, Inc., 151 Or. App 446, 455 (1997). Plaintiff could have brought his constitutional claims before the Oregon Court of Appeals and had every incentive to do so. See ORS § 183.482(8) (b) (C) (the court shall remand to the agency if it finds that the agency's exercise of discretion was in violation of a constitutional or statutory provision). Plaintiff would be barred in state court from bringing those claims now. Accordingly, plaintiff is precluded from seeking relief for violation of this constitutional rights in this court based on the same factual transaction raised in previous state court proceedings. Therefore, summary judgment is appropriate.

E. Plaintiff's motions for Preliminary Injunction (#17) and for a Temporary Restraining Order (#76)

Plaintiff's request for a temporary restraining order and preliminary injunction are denied as moot.

CONCLUSION

For the reasons stated above, plaintiff's motion for leave to file a second amended complaint (#32) is granted, defendant Romm's stipulated motion to dismiss (#21) is granted, the state defendants' motion for summary judgment (#58) is granted,

defendant Reynolds' motion to join (#62) is denied as moot, and plaintiff's motions for preliminary injunction (#17) and for a temporary restraining order (#76) are denied as moot and this action is dismissed.

DATED this _____ day of August, 2007.

s/ Michael R Hogan
United States District Judge

No. 08-1288

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

PATRICK J. BERGIN,

Petitioner,

v.

SUSAN MCCALL, NORMAN REYNOLDS, KATHLEEN HALEY, PHILIP PARSHLEY, DAVID R. GRUBE, CLIFFORD R. DEVENEY, DAVID G. WATT, LISA A. CORNELIUS, RAMIRO GAITAN, NATHALIE M. JOHNSON, DOUGLAS B. KIRKPATRICK, GARY J. LECLAIR, PATRICIA L. SMITH, JOHN C. STIGER, SHERIDAN A. THERINGER, JUDITH L. RICE, FRANK J. SPOKAS, JOSEPH L. THALER, SURESHT R. BALD, MARCIA G. DARM, LISA G. DODSON, and JAMES D. SCOTT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent NORMAN REYNOLDS, M.D., respectfully requests that this Court deny Petitioner PATRICK BERGIN's Petition for Writ of Certiorari.

STATEMENT OF FACTS

Petitioner PATRICK BERGIN, M.D., filed his "Complaint for Damages, Restitution, and Injunctive Relief" on December 7, 2006, alleging that twenty-three individual defendants violated his constitutional rights during the course of administrative proceedings conducted against his licensure by the Oregon Board of Medical Examiners (hereinafter "BME"). Dr. BERGIN, a cardiologist, was investigated, had his license suspended and, eventually, revoked. The BME's actions were predicated on evidence that BERGIN's professional acumen was jeopardized by his use of alcohol and other substances.

Respondent NORMAN REYNOLDS, M.D., was retained by the BME to evaluate licensee/Petitioner BERGIN. On November 27, 2002, Dr. REYNOLDS recommended that plaintiff enter and complete a "twelve-step" program. The Petitioner initially enrolled in, but declined to successfully complete, such a program. He also declined to participate in monitoring. Petitioner posited that all "twelve-step" programs rely upon "religious indoctrination" – requiring Dr. BERGIN to accept, observe, and/or practice religion under state edict. Dr. BERGIN also alleged that the underlying

diagnosis of his substance abuse or dependency was "false."

Petitioner alleged nine causes of action, "under 42 U.S.C. § 1985(3)."

Petitioner's theory of liability was factually and procedurally flawed. First, the BME's final order did not require Petitioner's participation in a twelve-step program of any nature, let alone one of the subset of programs premised upon "surrender" of self will to a higher power. (Final Order of Board of Medical Examiners, page 18, referenced in the District Court's decision, page 25a, Appendix to Petition.)

The second flaw in Petitioner's attempts to pursue an action in the federal court is that Petitioner declined to invoke state judicial review. (See District Court decision, page 26a, Petitioner's appendix.)

PROCEDURAL POSTURE

Respondent REYNOLDS filed a motion to dismiss the action pursuant to Rule 12(b)(6). Two separate grounds were asserted. First, that Dr. BERGIN had allowed the statute of limitations for pursuing a 42 U.S.C. § 1983 action to run. Second, Dr. REYNOLDS' only role was that of an expert consultant. He was, as a consequence, immune from liability for the theories advanced in Petitioner's complaint. The District Court, however, primarily dismissed Petitioner's action on the grounds that the BME's final

administrative adjudication was entitled to preclusive effect under the law of the state in which the resolution occurred.

Petitioner appealed to the Ninth Circuit Court of Appeals. In a simple, three court decision, the Court of Appeals affirmed:

> The district court properly granted summary judgment because BERGIN's claims were precluded by the Board's order suspending BERGIN's medical license. *See id.* at 1037 n.7 ("[We will give preclusive effect to the legal as well as the factual decisions of [state] administrative tribunals, if the courts of the state would do so and if the minimum requirements of [*United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)] are met."); *id.* at 1033 ("The fairness requirements of *Utah Construction* are: (1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate."); *Chavez v. Boise Cascade Corp.*, 772 P.2d 409, 410 (Or. 1989) ("[A] valid and final administrative adjudication has the same preclusive effects as a court's judgment.").

(See Petition, Appendix page 2a.)

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Uncontradicted Record Confirms That Petitioner Was Never Required to Undergo Religious Indoctrination.

Petitioner contends that, as a condition for retaining his professional licensure as a physician and surgeon, the state licensing agency required him to participate in a twelve-step program designed to address substance abuse. Traditionally, one of the twelve steps encourages program participants to resign themselves to a higher authority. Accordingly, Petitioner theorizes that he was the victim of state-sponsored imposition of religious doctrine, in a scope having constitutional consequences. However, the entire premise for liability, and certainly invocation of federal jurisdiction, was based upon a demonstrably false premise. The Final Order of the State of Oregon's Board of Medical Examiners did not require Petitioner to participate in a twelve-step program. (See Final Order, page 18, referenced in District Court Order, Petition for Writ of Certiorari, Appendix, page 25a.)

2. Neither Decision Below, Nor the Record, Raises the First Question Presented in the Petition.

Petitioner raises two questions. First, "whether coerced participation in a twelve-step based evaluation process violates the Establishment Clause, the

Free Exercise Clause, and the First Amendment." (Petition, page i.) However, neither the U.S. District Court for the District of Oregon, nor the Ninth Circuit Court of Appeals, decided such an issue.

Accordingly, this case is missing an essential factual predicate of the first question presented: the courts below did not rule on whether or not a state administrative agency can require a licensee to participate in a twelve-step substance abuse program as a condition of ongoing licensure. Moreover, there would have been no reason to address such a question, since participation in a twelve-step program ultimately was not imposed upon Petitioner as a condition of licensure. The *in propria persona* Petitioner would have this Court rule on a hypothetical situation that was not before the Courts below.

3. Petitioner's Second "Question Presented" Does Not Invoke Any Criteria Warranting Review by the United States Supreme Court.

Petitioner additionally queries "[W]hether a state administrative hearing has preclusive effect over Constitutional Claims in Federal Court." (See Petition, page i.)

As a threshold consideration, Petitioner should be estopped from raising such a question, as he rejected a full and fair opportunity to have his grievance adjudicated through judicial review in the state courts. Petitioner had a statutory right to raise his

constitutional claims before the Oregon Court of Appeals. (Oregon Revised Statute § 183.482(8)(b)(C) (The court shall remand to the agency if it finds that the agency's exercise of discretion was in violation of a constitutional or statutory provision). While Petitioner could have challenged the propriety of the administrative proceedings undertaken against his licensure in the Oregon State system, he simply declined to initiate judicial review.

It is respectfully submitted that Petitioner's failure to invoke – let alone exhaust – the judicial remedies available to adjudicate his hypothetical constitutional authority estopped him from forum shopping his case to the U.S. District Court. Moreover, it was appropriate for the District Court to enforce the preclusive effect given to an essential finding of an administrative agency since Petitioner had a full and fair opportunity to be heard, and to subject the administrative decision to scrutiny by the Oregon legal system, through judicial review. (*Stanich v. Precision Body and Paint, Inc.*, 151 Or. App. 446, 455 (1997).) Federal courts will give "preclusive effect to the legal as well as the factual decisions of [state] administrative tribunals, if the courts of the state would do so and if the minimum requirements of [*United States v. Utah Construction and Mining Company*, 384 U.S. 394, 422 (1966)] are met." Once it is shown that the administrative agency has acted in a judicial capacity, that the agency resolve disputed issues of fact properly before it, and that the parties had an adequate opportunity to

litigate, a valid and final administrative adjudication has the same preclusive effect as a court's judgment. (*Chavez v. Boise Cascade Corp.*, 772 P.2d 409, 410 (Or. 1989).)

The petition fails to identify any controversy concerning the restraint exercised by federal courts respecting full final and procedurally fair adjudications conducted in the state court system. Petitioner identifies no conflict between the decisions of any court of appeals. The foregoing principals do not constitute an important and recurring conflict of any type. Certainly, Petitioner has not identified a conflict between the decisions of any courts of appeals and decisional authority issued by the United States Supreme Court.

Petitioner's second issue does not constitute an important legal *problem* that is intrinsically important, requiring resolution. (*Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955).) Indeed, the foregoing doctrine of restrained federal intervention into final decisions rendered in state tribunals is sound and appropriate.

The Petitioner's second, procedural issue certainly does not give rise to an important constitutional issue. Indeed, the widely accepted, uncontroversial exercise of interventional restraint by the federal courts – particularly appropriate in this matter since the Petitioner has unilaterally declined to invoke statutorily-guaranteed judicial review presented under Oregon law – would unduly and, arguably, unconstitutionally, intrude on the authority retained by

states. There is no obvious issue of constitutional importance raised in the petition (*Gonzales v. Raich,* 545 U.S. 1, 14 (2005); *United States v. Booker,* 543 U.S. 220, 226 (2005).)

Petitioner has not identified any similar issues already pending before the Supreme Court.

Petitioner has failed to demonstrate that the lower courts' decisions are erroneous. Even if he made such a showing, this Court does not typically exercise jurisdiction for the simple purpose of correcting errors committed by the lower court. The U.S. Supreme Court is not a tribunal of errors and appeals. (*Ross v. Moffitt,* 417 U.S. 600, 616-617 (1974).)

CONCLUSION

Petitioner premises his application with a theoretical event which is controverted by the very record appended to the petition. Specifically, Petitioner falsely represents that he was required to participate in a twelve-step program for alleged substance abuse as a condition of his ongoing licensure. In fact, the U.S. District Court *found* that no such condition was imposed upon Petitioner in the final order issued by the BME.

Petitioner unilaterally declined to invoke statutorily-guaranteed judicial review available to him under Oregon law. He should be estopped from tardily forum – shopping for his challenge of an administrative

decision which he permitted to become final, without exercising his further rights of review under state law. The District Court, and, subsequently, the Ninth Circuit Court of Appeals' acknowledgment of the preclusive effect of an administrative ruling, after Petitioner's full and fair opportunity and incentive to be heard on the issue, was entirely appropriate.

The petition fails to identify any appropriate criteria warranting issuance of a writ of certiorari. The petition should be denied.

Respectfully submitted,

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